



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

DEC 10 2009

REPLY TO THE ATTENTION OF:
WW-16J

U.S. Army Corps of Engineers, Louisville District
ATTN: Robert J. Brown, CELRL-OP-FW
P.O. Box 489
Newburgh, Indiana 47629-0489

Subject: PN # 2009-937-rjb / UN Tributaries of Smith Fork and Honey Creek

Dear Mr. Brown:

The U.S. Environmental Protection Agency has reviewed the public notice (2009-937-rjb) issued on November 24, 2009. The proposed project is located north of Lynnville, Pike County, Indiana. The project would impact 23,883 linear feet of unnamed tributaries to Smith Fork and Honey Creek, tributaries of the Pigeon Creek and Patoka River respectively; both are waters of the United States. EPA has reviewed the PN, narrative, and associated appendices and has the following comments.

The applicant proposes to impact 23,883 linear feet of ephemeral and intermittent stream. The 404 (b)(1) Guidelines, 40 CFR Part 230, require that the applicant demonstrate that there are no practicable alternatives available that would have a less adverse impact on the aquatic environment for non-water dependant activities. Coal mining is classified as a non-water dependant activity. The applicant must develop alternatives that would reduce impacts to waters of the U.S.; this includes all activities mentioned in the application including surface mining, sediment basins, stockpiles, coal haulage and access roads, topsoil and subsoil piles and excess overburden storage. Given that the applicant only proposes to avoid 131 linear feet of ephemeral stream, EPA does not believe that the applicant has avoided and minimized stream and wetland impacts to the maximum extent practicable.

The applicant's mitigation plan does not adequately address mitigation, monitoring, performance standards, long-term protection, and financial assurances. The proposed mitigation does not compensate for all stream impacts. The mitigation for reclaimed sites should be equivalent to or better than those of undisturbed sites. The applicant must revise their mitigation plan to compensate for all stream impacts that result from this project.

The applicant proposes to monitor restored wetlands for a minimum of 5 years, or 3 years if container trees are used. The Mitigation Rule, § 332.6, requires a 5-year

monitoring period to determine success of mitigation, and suggests that a longer monitoring period might be needed in the case of slow-growing communities such as forested wetlands. Therefore, the applicant's monitoring plan must incorporate at least a 5-year monitoring period regardless of planting stock. However, given the slow-growing nature of a forested wetland, as is being proposed, a longer monitoring period might be required in order to properly judge success.

The applicant proposes using physical assessment techniques to evaluate the success of stream mitigation. The post-mining assessment should resemble the pre-mining assessment. Therefore, performance standards should include biological criteria, along with chemical and physical criteria. The applicant should revise their mitigation plan to include biological monitoring in the post-mining monitoring and assessment.

In addition to monitoring and assessment, the applicant must propose a means of long-term management and protection including financial assurances for the proposed mitigation. The Mitigation Rule, § 332.7, requires long-term protection of aquatic habitats, riparian areas, buffers, and uplands that comprise the mitigation site by using real estate instruments such as conservation easements. The applicant must revise their mitigation plan to include long-term management and protection, as well as financial assurances for the site.

EPA objects to the issuance of a permit for the project (PN # LRL-2009-937-rjb) as proposed for the above-mentioned reasons. Additional information on avoidance and minimization, compensatory mitigation, and monitoring is needed before the permit is issued. We appreciate the opportunity to provide comments on this PN. Please contact Scott McWhorter at (312) 886-6100 if you have any questions.

Sincerely,



Tom Davenport, Acting Branch Chief
Watersheds & Wetlands Branch